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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of KATHRYN and SCOTT DOSS.	
KATHRYN M. DOSS, Respondent, v. SCOTT MARLOWE DOSS, Appellant.	E068666 (Super.Ct.No. SWD1302071) OPINION

APPEAL from the Superior Court of Riverside County. F. Paul Dickerson III, Judge. Reversed with directions.

Hanson, Gorian, Bradford & Hanich and Erik J. Bradford for Appellant.

Westover Law Group, Andrew L. Westover and Morgan Cahill-Marsland for Respondent.

I. INTRODUCTION

Appellant, Scott Marlowe Doss (Scott), appeals from the May 9, 2017, family court order denying his request for an order (RFO) modifying (i.e., reducing) his $2,000 monthly spousal support obligation to his former spouse, respondent, Kathryn M. Doss (Kathryn). The family court denied Scott's RFO on the ground that Scott did not offer sufficient proof of changed circumstances, since 2013, when Scott agreed to pay Kathryn $2,000 in monthly spousal support pursuant to the parties' marital settlement agreement (MSA) and judgment dissolving their marriage.

In this appeal, Scott claims the family court abused its discretion in concluding he did not offer sufficient proof of changed circumstances, and we agree. Scott offered to show, and Kathryn did not dispute, that Scott, a heavy equipment operator, had regularly worked 10 to 12 hour days, including substantial overtime hours, *throughout* the parties' 18-year marriage, including during 2013 when the parties separated, entered into the MSA, and Scott agreed to pay Kathryn $2,000 in monthly spousal support. Scott offered to testify he was physically and mentally exhausted, and was thus no longer able to work overtime as he had during the marriage, and his employer was currently offering him only "minimal" overtime. Because Scott's offer of proof was sufficient to show changed circumstances warranting a trial on his RFO, we reverse the order denying Scott's RFO and remand the matter to the family court for further proceedings on the RFO.

II. BACKGROUND

Scott and Kathryn were married for 18 years one month and separated in August 2013. There are no children of the marriage. In September 2013, the parties entered into the MSA, which was incorporated into their judgment of dissolution filed in November 2013. The marriage was dissolved in March 2014.

Pursuant to the MSA, the parties agreed that Scott would pay Kathryn spousal support of $2,000 per month, with $1,000 payable on the 1st and 15th days of each month, beginning on October 1, 2013, "*and continuing until further order of court*," the death of either party, or the remarriage of Kathryn. (Italics added.)

In December 2016, Scott filed the RFO and supporting declarations, asking the court to reduce his spousal support obligation to no more than $500 per month. Kathryn filed a trial brief and responsive declarations, arguing there had been no changed circumstances justifying a reduction in spousal support. Both parties were represented by counsel.

A hearing on the RFO was held on May 9, 2017. At the beginning of the hearing, the court advised counsel it would first determine whether Scott could meet his burden of showing changed circumstances based on the arguments or opening statements of counsel, and the parties' offers of proof as set forth in the declarations and documents filed with the court. The court advised it would deny the RFO without conducting a trial on the factors set forth in Family Code section 4320,[1] unless Scott could show he could

[1] All further statutory references are to the Family Code.

demonstrate changed circumstances. The court asked each counsel whether this (offer of proof) procedure was "acceptable" to them, and each counsel responded that it was acceptable.[2]

Scott's declarations showed the following: He was 49 years old and was still employed as a heavy equipment operator, as he had been during the marriage, but his income had materially decreased since 2013 when he entered into the MSA and agreed to pay Kathryn $2,000 per month in spousal support. During the marriage, Scott worked approximately 60 hours per week, including 20 hours of overtime, but he was no longer working much overtime for two reasons: (1) he was currently "tired and exhausted" from working so much overtime, and (2) his employer was currently offering him only

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[2] Kathryn argues Scott did not show changed circumstances because he did not adduce *evidence* of changed circumstances; instead, he relied on the parties' declarations and other evidence filed with the court and the argument of his counsel. But through her counsel, Kathryn agreed it was "acceptable" for the court to determine whether Scott *could* show changed circumstances based on his counsel's argument and his offer of proof, i.e., based on the declarations and other evidence filed on the RFO. By failing to object and instead stipulating to this alternative (offer of proof) procedure, Kathryn forfeited her right to require the court to hear live testimony (§ 217) on the threshold question of changed circumstances. (*In re Marriage of Binette* (2018) 24 Cal.App.5th 1119, 1125-1129 [a party forfeits its right under § 217 to present live testimony at family court hearing on motion or order to show cause when the party does not ask the court to hear live testimony and instead agrees that the matter may be determined based on declarations or offers of proof]; *In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1270 ["Section 217 instructs that in a hearing on a motion or order to show cause, except under limited circumstances, *i.e., the parties' stipulation* or good cause, live testimony is required." (Italics added.)].) Thus, Kathryn may not complain, for the first time in this appeal, that the family court did not hear live testimony on the threshold question of changed circumstances and instead determined the question based on the parties' declarations and offers of proof. (*Mendoza v. Ramos* (2010) 182 Cal.App.4th 680, 687 [issues not raised in trial court may not be raised for the first time on appeal].)

"minimal" overtime. His "extensive hours" and 90-minute work commute had been harming him "physically and mentally," and he had often found himself falling asleep while driving home from work.

Scott submitted: "I am 49 years old and can not be working over 67 hours a week which includes the commute." He claimed it would be "dangerous" for him to continue to work so much overtime, operating heavy equipment, without sufficient rest. Even if his employer made more overtime available to him again, he would not be able to handle it. In her responsive declaration, Kathryn confirmed that Scott "*worked overtime on a regular basis*" "[*t*]*hroughout*" the 18- year marriage, and his "*average working day . . . was 10-12 hours*." (Italics added.) Kathryn claimed Scott's overtime hours had "always varied dependent [*sic*] upon weather and jobs assigned."

Scott claimed Kathryn was employed during most of the 18-year marriage, she had 22 years of bookkeeping experience with one drugstore employer, and she was able to earn as much as $22 per hour as a bookkeeper. Scott claimed Kathryn was able to be self-supporting, and she had had sufficient time to become self-supporting in the three years since the marriage ended. In response, Kathryn claimed she was unable to work as a bookkeeper. Although she had worked for one drugstore employer for 23 years and her title for that employer was "bookkeeper," her duties for that employer were "not consistent with those of a bookkeeper," and she lacked the "experience and skills" necessary to qualify as a "true bookkeeper."

Kathryn was unemployed from January 2009 through March 2013, when she found a "part-time merchandising job, working 20 hours per week." The parties separated in August 2013, five months after she began working again. She earned "minimum wage" and was unable to earn $20 per hour. In 2016, her "total annual income from employment" was $8,846. She was 54 years old, and needed "additional time and schooling to be able to become self-supporting."

In an income and expense declaration filed on May 2, 2017, Kathryn claimed she worked 15 to 20 hours per week and earned $10.70 per hour. During the previous 12 months, her average monthly gross income was $737.16. Including the $2,000 in monthly spousal support, her average monthly gross income was $2,737.16. Her average monthly expenses were $2,912.98. She submitted four paystubs from early 2017, showing she worked between 12.97 and 23.145 hours per week. She had been looking for full-time or part-time employment in order to get more hours, and she had had several job interviews but no job offers.

Scott filed income and expense declarations on December 9, 2016, and April 20, 2017, along with his bi-weekly paystubs from December 20, 2015, to April 8, 2017. The paystubs showed the total hours Scott worked during each bi-weekly pay period, along with his gross income, his net income, and year-to-date totals of these amounts. Scott rarely worked fewer than 80 hours between late 2015 and early 2017, and he sometimes worked over 95 hours. His regular hourly wage ranged from $36.55 in December 2015

to $38.53 in April 2017; his overtime hourly wage ranged from $54.825 to $57.795 during this period.

Scott's average gross *monthly* income was $8,304, from December 4, 2016, to April 8, 2017. It was $8,427, from December 20, 2015, to December 3, 2016. In 2016, Scott earned approximately $102,000 in gross income. His gross income in 2017, through April 8, 2017, was $25,257.86. Scott calculated that his average monthly gross income, based on his most recent 17 pay periods, was only $6,726.61. This monthly gross income figure closely approximated $6,858.53, the amount Scott would earn if he worked 178 hours each month at his most recent regular hourly rate of $38.53.

At the hearing, Scott's counsel argued Scott would show changed circumstances if he testified because he would show his income had decreased "drastically" since 2013 when he agreed to pay Kathryn $2,000 per month in spousal support. Counsel argues, as he did in the RFO, that Scott was earning less income for two reasons: (1) he was no longer mentally or *physically able* to work the amount of overtime he had worked during the marriage, and (2) his employer was no longer offering him more than minimal overtime. Scott's counsel also argued, and submitted points and authorities showing, that the court could not *require* Scott to continue to work overtime in order to pay Kathryn $2,000 in monthly spousal support.

Additionally, Scott's counsel argued Scott would show changed circumstances because Kathryn was currently earning more than she did in 2013 because the minimum wage had increased from $8 per hour in 2013 to $10.50, and Kathryn was currently

earning $10.70 per hour. Finally, counsel argued Kathryn had had sufficient time—over three years—to become self-supporting.

Kathryn's counsel countered Scott could not show changed circumstances because his income had not substantially decreased since 2013. Kathryn would testify that Scott had "taken overtime," "since day one," and he had indicated to Kathryn that he was "not going to take that overtime [anymore] because he's sick and tired of paying her." Additionally, counsel argued the statutory minimum wage increase was not a changed circumstance; there had been no vocational evaluation of Kathryn; and there was no *Gavron* warning[3] in the MSA or "anywhere [in] the record."

In rebuttal, Scott's counsel argued: "The bottom line is, my client no longer can work all of those overtime hours, nor does the law require him to. . . . [¶] The testimony would be that he is exhausted. It's killing him. It's taking everything out of him. . . . He works a manual job, very physical, heavy equipment. He gets tired on that heavy equipment. It could cause death or serious bodily injury driving home from that, after working all of those hours. It is dangerous . . . . [T]he law . . . [does not] require him to work overtime."

After hearing both counsel's arguments, the court ruled that Scott could not show a material change of circumstances and declined to hear evidence on the RFO or on the section 4320 factors concerning spousal support. The court noted that the parties had a

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[3] "'[A] "*Gavron* warning" is a fair warning to the supported spouse [that] he or she is expected to become self-supporting.'" (*In re Marriage of McLain* (2017) 7 Cal.App.5th 262, 272.)

long-term marriage, Scott had been paying spousal support for (over) three years, and nothing had changed since 2013 except Scott was now nearly age 50 and was tired from working so many hours with his long commute. The court emphasized that Scott "put himself in this position by agreeing" to pay Kathryn $2,000 per month pursuant to the parties' 2013 MSA. The court said Scott knew he was going to have to work overtime to make the spousal support payments, so "he did this to himself." The court also pointed out that Kathryn was working and no *Gavron* warning had been given to her. The court also rejected Scott's claim that the increase in the statutory minimum wage was a material change of circumstances.

III. DISCUSSION

A spousal support provision in a marital settlement agreement is subject to modification by further order of court, absent a provision in the agreement that specifically makes the support obligation nonmodifiable. (§§ 3591, subds. (a), (c), 3651, subds. (a), (d); see *In re Marriage of Hibbard* (2013) 212 Cal.App.4th 1007, 1013-1017 and *In re Marriage of Jones* (1990) 222 Cal.App.3d 505, 509-511.) Here, Scott's $2,000 monthly spousal support obligation to Kathryn, which Scott agreed to pay by entering into the MSA with Kathryn in 2013, is modifiable because the MSA states the obligation will "continu[e] until further order of court."

A party seeking to modify a spousal support obligation, as Scott did by filing his RFO, has the burden of showing a material change of circumstances since the agreement or order for the spousal support obligation was made. (*In re Marriage of Tydlaska* (2003)

114 Cal.App.4th 572, 575.) "'Change of circumstances' means a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs. It includes all factors affecting need and the ability to pay." (*In re Marriage of West* (2007) 152 Cal.App.4th 240, 246.)

A court has broad discretion to modify a spousal support order, and in exercising its discretion the court is required to consider the factors set out in section 4320, although the court has discretion to determine the weight it will give each factor. (*In re Marriage of Shimkus*, *supra*, 244 Cal.App.4th at p. 1273.) The factors listed in section 4320 include the supporting party's "*ability . . . to pay* spousal support, taking into account the supporting party's *earning capacity* . . . ." (§ 4320, subd. (c), italics added.) The factors also include "[t]he age and health of the parties[,]" "[t]he balance of the hardships to each party[,]" and "[t]he goal that the supported party shall be self-supporting within a reasonable period of time. . . ." (*Id.*, subds. (h), (k), (*l*).) They also include "[a]ny other factors the court determines are just and equitable." (*Id*., subd. (n).)

Here, the court determined that Scott was unable to meet his burden of showing a material change of circumstances because he could not show there had been a material change in his *ability to pay* spousal support since 2013 when the parties entered into the MSA. The court expressly ruled that Scott had "locked" himself into his $2,000 monthly spousal support obligation, even though Scott offered to show—and Kathryn did not dispute—that Scott's $2,000 monthly spousal support obligation was based on his history

of working approximately 10 to 12 hour workdays, or 60-hour workweeks, *throughout* the parties' 18-year marriage, including in 2013.

The court abused its discretion in ruling that Scott did not offer sufficient evidence of changed circumstances. In our view, Scott offered sufficient evidence of changed circumstances by offering to show that, given his advancing age of 49 and the physical nature of his job, he was no longer *able* to work the excessive hours of overtime he had worked throughout the parties' marriage. He also met his burden by offering to show that his employer was no longer offering him more than minimal overtime.

Over 25 years ago, our state Supreme Court held that, for purposes of determining a support obligation, a party's *earning capacity* "generally should not be based upon an extraordinary work regimen," that is, a work regimen "requiring excessive hours or an onerous work schedule"; instead, a party's earning capacity should be based upon "an objectively reasonable work regimen as it would exist at the time the determination of support is made." (*In re Marriage of Simpson* (1992) 4 Cal.4th 225, 234-235 (*Simpson*).)

Simpson cited with approval *In re Marriage of Smith* (1990) 225 Cal.App.3d 469 (*Smith*), in which the Court of Appeal affirmed an order awarding the former wife less than the increased spousal support she sought. (*Simpson*, *supra*, 4 Cal.4th at p. 235.) The family court in *Smith* ruled that the parties' marital standard of living was unreasonably high, and was therefore of less significance in determining the former wife's reasonable needs and support, because it was based on the former husband's excessive 60-hour workweeks. (*Simpson*, *supra*, at p. 235; *Smith*, *supra*, at pp. 478, 493.) The *Smith* court

observed: "A more appropriate measure of [wife's] post-separation needs is what would have been a reasonable standard of living for the parties given what [husband] would have earned had he worked at a reasonably human pace." (*Smith*, *supra*, at p. 493.) The *Simpson* court agreed: "Such a conclusion is compelled by equitable considerations and is consistent with the legislative policies enunciated in the statutes governing family support. . . ." (*Simpson*, *supra*, at p. 235.)

Here, Scott effectively offered to show, and Kathryn agreed, that Scott's $2,000 monthly spousal support obligation to Kathryn was based on Scott's having worked 10-12 hour workdays, or 60-hour workweeks, throughout the marriage. Although Scott agreed to pay Kathryn $2,000 in monthly spousal support when he entered into the MSA in 2013, Scott should not be penalized for agreeing to support Kathryn at an unreasonably high level, based on the parties' unreasonably high marital living standards and Scott's excessive overtime hours during the marriage. Scott's current ability to pay and earning capacity should be based on his *regular* hourly pay rates (as opposed to his overtime hourly pay rates) and a 40-hour workweek.

Additionally, the MSA made Scott's $2,000 monthly spousal support obligation modifiable upon further order of court. And even if Scott's employer offers him the same or similar amounts of overtime as he worked during the marriage, Scott's proffered testimony that he was no longer mentally or physically able to work more than minimal overtime was sufficient by itself to show changed circumstances. Thus, it is unnecessary for this court to determine whether the court abused its discretion in determining that the

increase in the minimum wage since 2013—and Kathryn's increased hourly wages from $8 to $10.70—did not constitute changed circumstances.

IV. DISPOSITION

The May 9, 2017, order denying Scott's RFO is reversed. The matter is remanded to the family court with directions to conduct a trial on Scott's RFO in order to determine whether Scott's monthly spousal support obligation to Kathryn should be modified, considering all of the factors set forth in section 4320.

The parties shall bear their costs on appeal. (Cal. Rules of Court, rule 8.278.)

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FIELDS
J.

We concur:

MILLER
Acting P. J.

SLOUGH
J.